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Nos. 443-4-5

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In the Supreme Court of the United States

OCTOBER TERM, 1929

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SOUTHERN JUDICIAL DISTRICT OF NEW YORK, JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, AND ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, PETITIONERS

v.

GALENO CHEMICAL COMPANY, INC., UNION COURSE PHARMACY, INC., P. T. CHEMICAL COMPANY, INC., AND ARTHUR S. KATZENBOGEN, DOING BUSINESS UNDER THE STYLE AND TRADE NAME OF THE CURATONE COMPANY

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT, JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, AND ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, PETITIONERS

v.

D. P. PAUL AND COMPANY, INC.

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT OF NEW YORK, AND JAMES M. DORAN, FEDERAL PROHIBITION COMMISSIONER OF THE UNITED STATES, PETITIONERS

v.

W. H. LONG & COMPANY, INC.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. ——

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR for the Southern Judicial District of New York, James M. Doran, Commissioner of Prohibition of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, petitioners

v.

GALENO CHEMICAL COMPANY, INC., UNION COURSE Pharmacy, Inc., P. T. Chemical Company, Inc., and Arthur S. Katzenbogen, doing business under the style and trade name of The Curatone Company

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No. ——

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR for the Second District, James M. Doran, Commissioner of Prohibition of the United States, and Andrew W. Mellon, Secretary of the Treasury of the United States, petitioners

v.

D. P. PAUL AND COMPANY, INC.

No. ——

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR for the Second District of New York, and James M. Doran, Federal Prohibition Commissioner of the United States, petitioners

v.

W. H. LONG & COMPANY, INC.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the petitioners above named, prays that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cases on July 15, 1929, affirming the decisions of the District Court for the Southern District of New York.

QUESTIONS PRESENTED

These cases present the following questions:

(1) Are denatured alcohol and medicinal preparations containing more than one-half of one per cent of alcohol by volume (described in Section 4, Title II, of the National Prohibition Act), at the time of manufacture and before being prepared for the market, "liquor" within the meaning of Sections 1 and 6, Title II, of the National Prohibition Act, the latter of which provides that permits to manufacture "liquor" may be issued for only one year?

(2) Does the provision of Section 6, Title II, of said Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, require that every permit have a definite time limitation; or is that requirement satisfied by a provision in the

permit that it shall remain in force until "revoked, suspended, or renewed as provided by law or regulations," or by a provision that it shall remain in operation until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto"?

(3) May a permit, issued under the provisions of Section 4, Title II, for the use of liquor in manufacturing denatured alcohol or medicinal preparations, and which contains no definite time limitation, be terminated by a general regulation providing that all such permits shall terminate on a date named?

STATUTE AND REGULATIONS INVOLVED

The National Prohibition Act, Title II, c. 85, 41 Stat. 305, 307–311:

> SEC. 1. When used in Title II and Title III of this Act (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 percentum or more of alcohol by volume which are fit for use for beverage purposes: * * *.
>
> * * * * * *
>
> (7) The term "regulation" shall mean any regulation prescribed by the commissioner

with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations. (U. S. C., Title 27, Sec. 4.)

SEC. 3. * * * and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. (U. S. C., Title 27, Sec. 12.)

* * * * * *

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, National Formulary, or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

* * * * * *

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such

articles and to purchase such liquor * * *. (U. S. C., Title 27, Sec. 13.)

* * * * *

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except * * *.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided,* That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further,* That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor. No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of

his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof. (U. S. C., Title 27, Sec. 16.)

* * * * *

SEC. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the

descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor * * *.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in section 4 of this Title, his permit to manufacture and sell such article shall be revoked. * * * (U. S. C., Title 27, Sec. 14.)

SEC. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named * * * at which time a hearing shall be had unless continued for cause. * * * If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. * * * (U. S. C., Title 27, Sec. 21.)

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Regulations 2, Treasury Department, Bureau of Prohibition, effective October 1, 1927:

SEC. 218. *All permits to be renewed annually.*—All permits issued and in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed in the manner hereinafter specified; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year, and if issued after August 31 of any calendar year shall expire on December 31 of the succeeding calendar year, and may be renewed only in the manner hereinafter specified.

Regulations 3, Treasury Department, Bureau of Prohibition, revised, effective October 1, 1927:

ART. 95. * * *

Permits issued to operate denaturing plants in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31, of the same year; and if issued after August 31 of any calendar year, shall expire on December 31 of the succeeding calendar year, unless duly renewed.

STATEMENT

Galeno Chemical Company, Inc., Union Course Pharmacy, Inc., P. T. Chemical Company, Inc., Arthur S. Katzenbogen (doing business as The Curatone Company), and D. P. Paul and Company,

Inc., held permits which authorized the use of liquor in the manufacture of certain medicinal preparations. These permits were issued November 20, 1926, March 11, 1925, November 20, 1926, May 19, 1925, and January 22, 1925, respectively. (Galeno Chem. Co. R. 4–5; 28–39; Paul Co. R. 5, 20.) W. H. Long & Company, Inc., held a permit issued August 16, 1923, authorizing the operation of a denaturing plant and the purchase and receipt of alcohol thereat. (Long Co. R. 4, 13.)

Each permit, except that issued to Long & Company, specified that it would continue in force until "revoked, suspended, or renewed as provided by law or regulations." (Galeno Chem. Co. R. 29, 34, 36, 38; Paul Co. R. 21.) The Long & Company permit provided that it would remain in force until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto." (Long Co. R. 13.) All except the Long & Company permit contained the provision that "this permit confers only a personal privilege and confers no vested rights." (Galeno Chem. Co. R. 29, 34, 36, 39; Paul Co. R. 22.)

On October 1, 1927, Regulations 2 and 3, Treasury Department, Bureau of Prohibition, became effective. Regulations 2 govern the use of liquor in the manufacture of medicinal preparations (Secs. 216, et seq., Regulations 2) and Regulations 3 the use of alcohol in the manufacture of denatured alcohol (Arts. 88–95, Regulations 3). Section 218 of Reg-

ulations 2 and Article 95 of Regulations 3 each provide that all permits in effect on October 1, 1927, shall expire on December 31, 1928, unless renewed, that all permits thereafter issued prior to September 1 of any calendar year shall expire on December 31 of the same year, and that those issued after August 31 shall expire on December 31 of the succeeding year.

In accordance with Regulations 2 and 3, applications for renewal of the permits were filed in each of the cases involved. (Galeno Chem. Co. R. 6–7; Paul Co. R. 9; Long Co. R. 5.) The application of Long & Company was disapproved. (Long Co. R. 20.) A date for hearing on each application involved in the Galeno Chemical Company case and the Paul Company case was set by the local Prohibition Administrator and the permittees were given notice to produce evidence why their permits should be renewed and why alcohol or other spirits, instead of whisky, should not be used in the manufacture of their products. (Galeno Chem. Co. R. 6, 41–46; Paul Co. R. 10, 24.)

Suits in equity were thereupon filed in the District Court for the Southern District of New York in which the permittees asked for temporary and permanent injunctions restraining the administrative officers from proceeding with the aforesaid hearings and from otherwise interfering with their permits. In the Galeno Chemical Company case and the Paul Company case it was asserted that Section 218 of Regulations 2, in so far as

it purported to "cancel, terminate, suspend or revoke" the several permits involved, was void. (Galeno Chem. Co. R. 8; Paul Co. R. 13.) In the Long Company case it was contended that the permit in question could be terminated only as provided in Section 9, Title II, of the National Prohibition Act, thereby raising the validity of Article 95 of Regulations 3. (Long Co. R. 8, 34–37.)

The District Court, in the Galeno Chemical Company case and the Paul Company case, granted temporary injunctions restraining the defendants from interfering with plaintiffs' permits (Galeno Chem. Co. R. 56; Paul Co. R. 66), and in the Long Company case granted a permanent injunction (Long Co. R. 37, 39). The several cases were appealed to the Circuit Court of Appeals. (Galeno Chem. Co. R. 63–77; Paul Co. R. 68–77; Long Co. R. 41–47.) That court, rendering its principal opinion in the Galeno Chemical Company case (R. 83), affirmed the decrees below. (Galeno Chem. Co. R. 86; Paul Co. R. 81; Long Co. R. 50.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

(1) In affirming the decrees of the District Court.

(2) In holding that permits authorizing the manufacture of denatured alcohol and medicinal preparations, described in Section 4, Title II, of the National Prohibition Act, are not permits for the manufacture of "liquor" within the meaning of Sections 1 and 6, Title II, of said Act.

(3) In holding that the provision of Section 6, Title II, that every permit shall "designate and limit * * * the time when" the authorized acts may be performed, does not require that a permit contain a definite and certain time limitation, but was satisfied by the above-quoted provisions in the permits here involved.

(4) In holding that Section 9, Title II, of the Act constitutes a limitation upon the power of the Secretary of the Treasury and the Federal Prohibition Commissioner to issue the regulations in question.

REASONS FOR GRANTING THE WRITS

(1) There is a direct conflict between the decision of the Circuit Court of Appeals for the Second Circuit herein and the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Chicago Grain Products Co.* v. *Mellon,* 14 F. (2d) 362.

(2) The question whether the Federal Prohibition Commissioner may by general regulation terminate permits of the class here involved is one which is constantly arising. According to information supplied by the Commissioner under date of August 13, 1929, there were at that time outstanding within the jurisdiction of the Second and Third Circuits alone 7,755 permits without definite time limitations. There are now pendng in the Circuit Court of Appeals for the Third Circuit over thirty cases presenting the question here involved.

(3) The question of the power and authority of the Commissioner to promulgate such regulations is one of great importance not only to the Government in the administration of the permit system under the National Prohibition Act, but also to the large number of persons holding permits for the use of liquor in trade and industry.

Wherefore, it is respectfully submitted that this petition for writs of certiorari to review the decrees of the Circuit Court of Appeals for the Second Circuit in the above cases should be granted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

OCTOBER, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (Galeno Chem. Co. R. 83) has not yet been reported.

JURISDICTION

The several decrees of the Circuit Court of Appeals were entered July 15, 1929. (Galeno Chem. Co. R. 86; Paul Co. R. 81; Long Co. R. 50.) The jurisdiction of this Court to issue the writs is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

A statement of the case, the questions presented, and the statutes and regulations involved will be found in the petition.

ARGUMENT

I

AT THE TIME OF MANUFACTURE AND BEFORE BEING PREPARED FOR THE MARKET, DENATURED ALCOHOL AND MEDICINAL PREPARATIONS CONTAINING MORE THAN ONE-HALF OF ONE PER CENT OF ALCOHOL BY VOLUME ARE "LIQUOR" WITHIN THE MEANING OF SECTIONS 1 AND 6, TITLE II, OF THE ACT. PERMITS TO MANUFACTURE "LIQUOR" MAY BE ISSUED FOR ONE YEAR ONLY

Section 1, Title II, of the National Prohibition Act includes as "liquor," "alcohol, brandy, whisky,

* * * and in addition thereto any spirituous * * * liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are *fit for use for beverage purposes.*" (Italics ours.)

It is submitted that, in defining "liquor," Congress included not only those alcoholic compounds which are fit for immediate use as a beverage, but all compounds containing more than one-half of one per cent of alcohol which are "fit for use for *beverage purposes.*" See *Cywan* v. *Blair* (N. D. Ill.), 16 F. (2d) 279, 283, where it was held that Section 1 includes "liquids usable for beverage purposes, either mediately or immediately." Pure alcohol, for instance, is not fit for use as a beverage. It is, however, fit "for use" for "beverage purposes." By adding water to alcohol one produces a mixture which is fit for use as a beverage. *Chicago Grain Products Co.* v. *Mellon,* 14 F. (2d) 362, 363. Specially denatured alcohol is not fit for use as a beverage, but it is common knowledge that it is used "for beverage purposes." By extracting the denaturants from specially denatured alcohol and adding water one has a potable mixture. Neither alcohol nor specially denatured alcohol is fit for use as a beverage in its original state. Both substances may, however, be used for beverage purposes when treated. The same may be said

of many medicinal preparations and patented medicines.

That Congress intended that the definition of "liquor" as set forth in Section 1 of Title II should include the articles here involved, together with the other articles mentioned in Section 4 of Title II, is indicated by the fact that Congress found it necessary to exclude them from the operation of the Act. It provided in Section 4 that said articles "shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act." If Congress had not considered these articles as included within Section 1 of the Act, this provision of Section 4 would have been unnecessary. See *Brown* v. *Maryland,* 12 Wheat. 419, 438.

These articles are treated as intoxicating liquor and, under the provisions of Section 4, remain within the operation of the Act until two things have occurred: (1) the articles must have "been manufactured;" *and* (2) they must have been "prepared for the market." The articles are not excluded from the provisions of the Act at the time of manufacture. They remain within the Act until "prepared for the market." A proviso to a general Act will be strictly construed and will take no case out of the general provisions of the Act which does not fall fairly within its terms. See *United States* v. *Dickson,* 15 Pet. 141, 165. This was the intent of Congress. Section 5 of Title II provides that if a Section 4 article be not manufactured

strictly according to authorized formula, it shall be treated as an intoxicating liquor. A permit to manufacture one of these articles is therefore a permit to manufacture "liquor." See *Chicago Grain Products Co.* v. *Mellon, supra,* p. 363; *Cywan* v. *Blair, supra,* pp. 283–284.

Section 6 of Title II provides that "All permits to manufacture * * * liquor, may be issued for one year, * * *." Regulations 2 and 3 here involved therefore did no more than state the law of the National Prohibition Act, and hence respondents' permits were never valid, in any event, for a longer time than that for which they might have been issued under Section 6.

II

SECTION 6 OF TITLE II REQUIRES THAT ALL PERMITS HAVE A DEFINITE TIME LIMITATION. THE PERMITS HERE INVOLVED DID NOT CONTAIN A SUFFICIENT TIME LIMITATION UNDER THAT SECTION

Even if it be held, however, that the denatured alcohol and medicinal preparations here involved were not "liquor" within the meaning of the first sentence of Section 6, it is submitted that the failure of the permits here in question to provide any definite time limitation rendered them invalid under a general provision of Section 6, which the court below assumed (Galeno Chem. Co. R. 84) applied to permits other than for the manufacture of liquor (*cf. Driscoll* v. *Campbell* (C. C. A. 2d), 33 F. (2d) 281) and which reads as follows:

> Every permit shall be in writing, dated when issued, and signed by the commissioner

> or his authorized agent. It shall give the name and address of the person to whom it is issued and shall *designate and limit the acts that are permitted and the time when and place where such acts may be performed.* (Italics ours.)

This statute directs that every permit shall *designate* and *limit* three things: (1) the acts that are permitted; (2) the time when, and (3) the place where, such acts may be peformed. Effect must be given to every word of the statute.

We submit that it is plain that when Congress directed that every permit should designate the acts to be permitted and the place where they were to be performed it had in mind a definite and specific designation, and not one which would leave open to speculation and conjecture what acts or place were contemplated by the permit. In no other way could proper control be exercised over permittees. Likewise, and for a similar reason, Congress must have intended that the designation as to "time" should be definite. Not only must the time be *designated,* but the life of the permit must be *limited* to the designated time. The words "designate" and "limit" must be given the same meaning in respect to the "time" as they have with respect to the "acts" and "place." See *Lewellyn* v. *Harbison* (C. C. A. 3d), 31 F. (2d) 740, 742. Moreover, the limitation must be in the permit itself. Obviously, if an indefinite designation and an indefinite limitation as to the "acts" and

"place" will not satisfy the statute, as we contend, then an indefinite designation and an indefinite limitation as to the "time" are insufficient.

Congress was fully aware of the difficulties always attendant upon efforts to suppress the liquor traffic. *Donnelley* v. *United States*, 276 U. S. 505, 512–513. A regulatory or permit system was not new. *United States* v. *Katz*, 271 U. S. 354, 358–359. It must have known that permits authorizing indefinite "acts" at an indefinite "place" issued for an indefinite "time" would render impossible of effective enforcement the permit system set up by the Act and defeat its purpose. We submit that when Congress used the words "designate" and "limit" it meant a definite designation and a definite limitation.

The permits here involved recited that they should remain in force until "revoked, suspended, or renewed as provided by law or regulations," or until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto."[1]

We submit that this is no sufficient limitation of time within the requirement of Section 6. Of course, a permit would terminate upon "surrender," whether it contained a provision to that effect or not. There is no provision of law for the "suspension" of a permit, and hence the insertion of

[1] For a history of the regulations and decisions affecting the life of permits, see Appendix.

the word "suspended" was surplusage. In any event, a suspension of a permit would not terminate its life. A permit could not be "renewed" unless it had expired. The futility of limiting the life of a permit to the time of its beginning anew is obvious.

As to "revocation," Sections 5 and 9 of Title II direct that where a permittee is not manufacturing a Section 4 article according to authorized formula, or where he is not in good faith conforming to the National Prohibition Act or has violated a State law relating to intoxicating liquor, the Commissioner shall revoke his permit. These provisions are undoubtedly mandatory. See *Donnelley* v. *United States*, 276 U. S. 505. If a permit is revoked pursuant to the provisions of Section 5 or Section 9 it, of course, no longer continues in force. Obviously, a permit would terminate upon revocation even though it did not so provide. Congress in inserting a requirement that every permit shall designate and limit the time within which the acts authorized shall be performed must have had in mind the accomplishment of a purpose other than those to which Sections 5 and 9 relate. We submit that this purpose was the advantage to be afforded by a definite restriction upon the life of permits. With permits terminating upon definite dates the permittee would be required periodically to apply for renewal of his permit and would have the burden of establishing his right to a new, or the renewal of an old, permit. (Sec. 6; *Chicago Grain Products Co.* v. *Mellon, supra*, p. 364; *Yudelson* v.

Andrews (C. C. A. 3d), 25 F. (2d) 80, 82–83.) But such purpose is not accomplished by construing Section 6 as authorizing permits, which, as held by the court below (Galeno Chem. Co. R. 85), reserved to the administrative officers no right to terminate except by revocation proceedings particularly prescribed by the Act. Before the Commissioner may revoke an outstanding permit under Section 5 or Section 9 he must hold a hearing and establish one of the grounds of revocation therein specified. We submit that if Congress had intended that permittees might be subject to no more effective control than would be secured through the proceedings for revocation authorized by those sections, it would have been unnecessary to require the limitation of time provided in Section 6.

III

SECTION 9 OF TITLE II IS NOT A LIMITATION UPON THE QUASI-LEGISLATIVE POWERS DELEGATED TO THE ADMINISTRATIVE OFFICERS TO ESTABLISH GENERAL REGULATIONS

If, as held by the court below, Congress did not intend by Section 6 to provide for the termination of Section 4 permits on a definite date, then we submit that the Act delegated to the Commissioner the power to fix the life of such permits by regulation, and that Regulations 2 and 3 were promulgated in pursuance of such power. Section 9 of Title II authorizes the revocation of an *indi-*

vidual permit for cause, and provides against arbitrary or capricious action by requiring a hearing and the production of evidence. In *Chicago Grain Products Co.* v. *Mellon, supra,* it was said (p. 363):

> The provisions of section 9, title 2, are limited to inquiries to determine whether *a permit shall be canceled for the reasons therein specified.* (Italics ours.)

It is, we submit, no limitation upon and in no way relates to the quasi-legislative power to establish *general* regulations.

Congress has the power by legislation to cancel permit rights. *Everard's Breweries* v. *Day,* 265 U. S. 545, 563. It has the right to delegate this power. See *Liscio v. Campbell* (C. C. A. 2d), opinion rendered July 2, 1929, but not yet reported.

The power to promulgate regulations is not one to be once used and forever lost. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 638; *Lacquer & Chemical Corporation* v. *Mills,* 22 F. (2d) 697, 699; affirmed 22 F. (2d) 700; certiorari denied, 276 U. S. 617; *Cywan* v. *Blair,* 16 F. (2d) 279, 282; *Millstone* v. *Yellowley,* 290 Fed. 855, 857. The administrative officers, acting in a field inherently subject to police regulations, could not bargain away the rights of the public, *Mugler* v. *Kansas,* 123 U. S. 623; and neither could they by a regulation providing for a permit of indefinite duration confer a vested right

which would prevent them from promulgating a subsequent regulation terminating the permit on a day certain, with provision for its renewal, so that they might have more effective supervision over permittees. As was said in *Cywan* v. *Blair, supra* (p. 282), with respect to Treasury Decision No. 3773, containing provisions similar to Regulations 2 and 3 here involved:

> Perpetuities are not generally favored. The whole field of permit privileges, under not only the Prohibition Act, but all other acts, shows that the common practice is to limit permits for a definite period, renewable at the termination of each period. It is not clear and beyond doubt, as the complainant contends, that the Treasury Decision here involved is not a reasonable regulation.

CONCLUSION

For the above reasons we submit that, especially in view of the provision of Section 3 that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," the decision of the court below holding invalid Regulations 2 and 3, so far as they affected the permits here involved, was erroneous. As the cases present a conflict of decisions and involve questions of importance in the administration of the permit system under the National Prohibition Act which are constantly arising, they are proper ones for review by this Court. The peti-

tion for the several writs of certiorari should therefore be granted.

Respectfully submitted.

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OCTOBER, 1929.

APPENDIX

HISTORY OF PERTINENT REGULATIONS

On January 16, 1920, Regulations 60 were promulgated. Regulations 60 governed the manufacture of all the articles enumerated in Section 4 of Title II, except denatured alcohol. Section 18 of these Regulations provided that all manufacturing permits issued thereunder prior to August 31st of any year would expire on December 31st of such year, and that all such permits issued from September 1st to December 31st of any year would expire on December 31st of the following year, unless otherwise provided. On January 31, 1920, Regulations 61 were promulgated. These regulations governed the manufacture of denatured alcohol. Article 97 thereof provided that permits to manufacture denatured alcohol would remain in force until voluntarily surrendered or revoked by the Commissioner. On March 14, 1924, Regulations 60 were revised so as to provide that manufacturing permits issued under Section 4 of Title II should continue in force until canceled, suspended, revoked or voluntarily surrendered by the permittee. (Section 260, pp. 17–18, Regulations 60, as revised.) On November 14, 1925, Treasury Decision 3773 was promulgated. This Decision provided that all manufacturing permits, including permits to manufacture denatured alcohol, issued prior to August 31st of any calendar year, should expire on December 31st of the same year, and that all manu-

facturing permits issued after August 31st of any calendar year should expire on December 31st of the succeeding year.

On June 1, 1926, the Circuit Court of Appeals for the Second Circuit, in the case of *Higgins* v. *Foster*, 12 F. (2d) 646, held that Treasury Decision 3773 was void in so far as it attempted to cancel a permit of indefinite duration, issued under Regulations 61, authorizing the manufacture of denatured alcohol.

On September 1, 1926, Treasury Decision 3925, so far as here pertinent, rescinded Treasury Decision 3773. On November 9, 1926, the Circuit Court of Appeals for the Seventh Circuit, in the case of *Chicago Grain Products Co.* v. *Mellon*, 14 F. (2d) 362, held that Treasury Decision 3773 was valid. On September 2, 1927, Regulations 2, being a revision of Regulations 60, were promulgated. On August 23, 1927, Regulations 3, being a revision of Regulations 61, were promulgated. Both were effective October 1, 1927. Regulations 2 and 3 substantially reenacted the provisions of Treasury Decision 3773 and purported to terminate all outstanding unlimited manufacturing permits as of the 31st day of December, 1928. (Section 218 of Regulations 2; Article 95 of Regulations 3.)

U. S. GOVERNMENT PRINTING OFFICE: 1928

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Nos. 443, 444, and 445

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1929

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SOUTHERN JUDICIAL DISTRICT OF NEW YORK, JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, AND ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, PETITIONERS

v.

GALENO CHEMICAL COMPANY, INC., UNION COURSE PHARMACY, INC., P. T. CHEMICAL COMPANY, INC., AND ARTHUR S. KATZENBOGEN, DOING BUSINESS UNDER THE STYLE AND TRADE NAME OF THE URATONE COMPANY

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT, JAMES M. DORAN, COMMISSIONER OF PROHIBITION OF THE UNITED STATES, AND ANDREW W. MELLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, PETITIONERS

v.

D. P. PAUL AND COMPANY, INC.

MAURICE CAMPBELL, FEDERAL PROHIBITION ADMINISTRATOR FOR THE SECOND DISTRICT OF NEW YORK, AND JAMES M. DORAN, FEDERAL PROHIBITION COMMISSIONER OF THE UNITED STATES, PETITIONERS

v.

W. H. LONG & COMPANY, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1929

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W. H. LONG & COMPANY, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 33) is reported in 34 F. (2d) 642.

JURISDICTION

The several decrees of the Circuit Court of Appeals were entered on July 15, 1929. (R. 36–37, 73–74, 97–98.) Petition for certiorari was filed October 15, 1929. Writs of certiorari were granted December 2, 1929. (R. 98–99.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Are denatured alcohol and medicinal preparations containing more than one half of one per cent of alcohol by volume (described in Section 4, Title II, of the National Prohibition Act), at the time of manufacture and before being prepared for the market, "liquor" within the meaning of Sections 1 and 6, Title II, of the National Prohibition Act, the latter of which provides that permits to manufacture "liquor" "shall expire on the 31st day of December next succeeding the issuance thereof"?

(2) Does the provision of Section 6, Title II, of said Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, require that every permit have a definite time limitation; or is that requirement satisfied by a provision in the permit that it shall remain in force until "revoked, suspended, or renewed as provided by law or regulations," or by a provision that it shall remain in

operation until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto"?

(3) May a permit, issued under the provisions of Section 4, Title II, for the use of liquor in manufacturing denatured alcohol or medicinal preparations, and which contains no definite time limitation, be terminated by a general regulation providing that all such permits shall terminate on a date named?

STATUTE AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are set forth in the appendix hereto (pp. 25–31).

STATEMENT

Galeno Chemical Company, Inc., Union Course Pharmacy, Inc., P. T. Chemical Company, Inc., Arthur S. Katzenbogen (doing business as The Curatone Company), the respondents in No. 443 (hereafter referred to as the *Galeno Chemical Company Case*) and D. P. Paul and Company, Inc., the respondent in No. 444, held permits which authorized the use of liquor in the manufacture of certain medicinal preparations. These permits were issued November 20, 1926, March 11, 1925, November 20, 1926, May 19, 1925, and January 22, 1925, respectively. (R. 2, 16, 14, 15, 11, 39, and 47.) W. H. Long & Company, Inc., the respondent in No. 445, held a permit issued August 16, 1923, authoriz-

ing the operation of a denaturing plant and the purchase and receipt of alcohol thereat. (R. 76, 80.)

Each permit, except that issued to Long & Company, specified that it would continue in force until "revoked, suspended, or renewed as provided by law or regulations." (R. 12, 14, 15-16, 17, 48.) The Long & Company permit provided that it would remain in force until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto." (R. 80-81.) All the permits were issued in accordance with the regulations in force at the time of issuance. That to W. H. Long & Company was issued in accordance with the provisions of Article 97 of Regulations 61. The Union Course Pharmacy, Arthur S. Katzenbogen, and D. P. Paul and Company permits were issued in accordance with Section 260 of Regulations 60, as revised March 14, 1924. The Galeno Chemical Company and P. T. Chemical Company permits were issued under Treasury Decision 3925, promulgated September 1, 1926. (For history of Regulations and Treasury Decision, see Appendix, pp. 31-33.) All except the Long & Company permit contained the provision that "this permit confers only a personal privilege and confers no vested rights." (R. 12, 15, 16, 17, 48.)

On October 1, 1927, Regulations 2 and 3, Treasury Department, Bureau of Prohibition, became effective. Regulations 2 govern the use of liquor

in the manufacture of medicinal preparations (Secs. 216, et seq., Regulations 2) and Regulations 3 the use of alcohol in the manufacture of denatured alcohol. (Arts. 88–95, Regulations 3.) Section 218 of Regulations 2 and Article 95 of Regulations 3 each provide that all permits in effect on October 1, 1927, shall expire on December 31, 1928, unless renewed; that all permits thereafter issued prior to September 1 of any calendar year shall expire on December 31 of the same year; and that those issued after August 31 shall expire on December 31 of the succeeding year.

In accordance with Regulations 2 and 3, applications for renewal of the permits were filed in each of the cases involved. (R. 3–4, 41–42, 77.) The application of Long & Company was disapproved. (R. 84.) A date for hearing on each application involved in the *Galeno Chemical Company case* and the *Paul Company case* was set by the local Prohibition Administrator, and the permittees were given notice to produce evidence why their permits should be renewed and why alcohol or other spirits, instead of whiskey, should not be used in the manufacture of their products. (R. 4, 18–20, 42, 49.)

Suits in equity were thereupon filed in the District Court for the Southern District of New York in which the permittees asked for temporary and permanent injunctions restraining the administrative officers from proceeding with the aforesaid hearings and from otherwise interfering with their

permits. In the *Galeno Chemical Company case* and the *Paul Company case* it was asserted that Section 218 of Regulations 2, in so far as it purported to "cancel, terminate, suspend, or revoke" the several permits involved, was void. (R. 4, 43–44.) In the *Long Company case* it was contended that the permit in question could be terminated only as provided in Section 9, Title II, of the National Prohibition Act, thereby raising the validity of Article 95 of Regulations 3. (R. 78, 90–92.)

The District Court, in the *Galeno Chemical Company case* and the *Paul Company case*, granted temporary injunctions restraining the defendants from interfering with plaintiffs' permits (R. 24–25, 68–69) and in the *Long Company case* granted a permanent injunction. (R. 93.) The several cases were appealed to the Circuit Court of Appeals. (R. 27–28, 70–71, 94–95.) That court, rendering its principal opinion in the *Galeno Chemical Company case* (R. 33), affirmed the decrees below. (R. 36–37, 73–74, 97–98.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

(1) In affirming the decrees of the District Court.

(2) In holding that permits authorizing the manufacture of denatured alcohol and medicinal preparations, described in Section 4, Title II, of the National Prohibition Act are not permits for

the manufacture of "liquor" within the meaning of Sections 1 and 6, Title II, of said Act.

(3) In holding that the provision of Section 6, Title II, that every permit shall "designate and limit * * * the time when" the authorized acts may be performed, does not require that a permit contain a definite and certain time limitation, but was satisfied by the above-quoted provisions in the permits here involved.

(4) In holding that Section 9, Title II, of the Act constitutes a limitation upon the power of the Secretary of the Treasury and the Commissioner of Prohibition to issue the regulations in question.

SUMMARY OF ARGUMENT

Congress intended that all permits should be issued for a limited time. Permits to manufacture "liquor" may be issued for not more than one year. All permits required by statute must designate an expiration date. If, however, Congress did not make provision for the expiration of Section 4, Title II, permits, it left the matter to the control of regulations to be issued from time to time.

A more detailed summary of these propositions may be stated as follows:

1. Permits to manufacture "liquor" may be issued for one year, but they expire by operation of law "on the 31st day of December next succeeding the issuance thereof." (Section 6, Title II, of the National Prohibition Act.) At the time of being manufactured and before being prepared for the

market denatured alcohol and medicinal preparations containing more than one-half of 1 per cent of alcohol by volume are "liquor" within the meaning of Section 6. Permits to manufacture denatured alcohol and medicinal preparations are therefore permits to manufacture "liquor," and expire by operation of law "on the 31st day of December next succeeding the issuance thereof."

2. If permits to manufacture denatured alcohol and medicinal preparations be not permits to manufacture "liquor," nevertheless every permit which the Commissioner is authorized to issue must "designate and limit the acts that are permitted and the time when and place where such acts may be performed." Section 6, Title II. When Congress used the words "designate" and "limit" it meant a definite designation and a definite limitation. Accordingly, a permit having an indefinite time limitation was unauthorized. Regulations 2 and 3 brought the practice into accord with the statute and are therefore valid. See *Higgins* v. *Mills* (C. C. A. 2d), 22 F. (2d) 913, 914.

3. If Congress did not provide for the termination of Section 4 permits on definite dates, it left the matter open to control by regulations to be issued from time to time. The exercise of a delegated power is not to be once used and forever lost. The administrative officers, acting in a field inherently subject to police regulations, could not bargain away the rights of the public in such manner as to preclude the future exercise of the powers dele-

gated. Section 9, Title II, of the National Prohibition Act has reference to functions judicial in their nature conferred on the administrative officers; to inquiries as to whether an individual permit should be revoked. It in no way relates to the delegated quasi-legislative power to establish regulations.

ARGUMENT

I

AT THE TIME OF MANUFACTURE AND BEFORE BEING PREPARED FOR THE MARKET, DENATURED ALCOHOL AND MEDICINAL PREPARATIONS CONTAINING MORE THAN ONE-HALF OF ONE PER CENT OF ALCOHOL BY VOLUME ARE "LIQUOR" WITHIN THE MEANING OF SECTIONS 1 AND 6, TITLE II, OF THE ACT. PERMITS TO MANUFACTURE "LIQUOR" MAY BE ISSUED FOR ONE YEAR ONLY

W. H. Long & Company held a permit to manufacture denatured alcohol. (R. 80–81.) A similar permit was involved in the case of *Higgins* v. *Foster*, 12 F. (2d) 646, where the Circuit Court of Appeals for the Second Circuit held that denatured alcohol is not "liquor" within the meaning of Section 6, Title II, of the National Prohibition Act, which provides that all permits to manufacture "liquor" "may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof." That decision was followed in the case of Galeno Chemical Company (R. 34) involving permits to use whiskey in the manufacture of medicinal preparations. (R. 11–16.) The W. H. Long & Company (R. 97) and the D. P. Paul

Company (R. 73) cases were decided upon authority of the decision in the *Galeno Chemical Company case*. The question which will be first considered is whether permits to use alcohol in the manufacture of denatured alcohol, and to use liquor in the manufacture of medicinal preparations, are permits to manufacture "liquor" within the meaning of Section 6.

Section 1 includes as "liquor" not only those alcoholic compounds which are fit for immediate use *as a beverage*, but all compounds containing more than one-half of one per cent of alcohol which are "fit for use for beverage purposes." See *Cywan* v. *Blair* (N. D. Ill.), 16 F. (2d) 279, 283, where it was held that Section 1 includes liquids usable *for beverage purposes*, either mediately or immediately. Pure alcohol, for instance, is not fit for use *as a beverage*. It is, however, "fit for use *for beverage purposes*." By adding water to alcohol one produces a mixture which is fit for use *as a beverage*. *Chicago Grain Products Co.* v. *Mellon*, 14 F. (2d) 362, 363. Specially denatured alcohol may not be fit "for use as an intoxicating beverage," but it is common knowledge that it is used "for beverage purposes." By extracting the denaturant from specially denatured alcohol and adding water one has a potable mixture. Neither alcohol nor specially denatured alcohol is fit for use *as a beverage* in its original state. Both substances may, however, be used *for beverage purposes* when treated.

That Congress intended that the definition of "liquor" contained in Section 1, Title II, should include all articles mentioned in Section 4 is indicated by the fact that Congress found it necessary to exclude them under certain conditions from the operation of the Act. It is provided in Section 4 that said articles "shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act." The implication is that these articles would be within the statute, and hence "liquor," were they not expressly excepted. See *United States* v. *Woodward,* 256 U. S. 632, 634. If Congress had not considered these articles as included in Section 1, this provision of Section 4 would have been unnecessary. See *Brown* v. *Maryland,* 12 Wheat. 419, 438.

These articles are treated as intoxicating liquor and, under the provisions of Section 4, remain within the operation of the Act until two things have occurred: (1) the articles must have "been manufactured"; *and* (2) they must have been "prepared for the market." The articles are not excluded from the provisions of the Act at the time of manufacture. They remain within the Act until "prepared for the market." A proviso to a general Act will be strictly construed and will take no case out of the general provisions of the Act which does not fall fairly within its terms. See *United States* v. *Dickson,* 15 Pet. 141, 165. This was the intent of

Congress. Section 5 of Title II provides that if a Section 4 article be not manufactured strictly according to authorized formula it shall be treated as "liquor." It is submitted that a permit to manufacture one of these articles is a permit to manufacture "liquor". See *Chicago Grain Products Co.* v. *Millon, supra,* p. 363; *Cywan* v. *Blair, supra,* pp. 283–284.

The administrative practice with respect to this matter has not been uniform nor wholly consistent, as is shown by the history of the regulations and Treasury decisions printed in the appendix. (*Infra,* pp. 31–33.) From 1920 to 1924 the regulations treated denatured alcohol differently from the other articles enumerated in Section 4, Title II, permits to manufacture the former not having been made subject to the time limitation applying to such other articles. Thereafter, denatured alcohol and the other articles enumerated in Section 4 were treated upon the same basis, but the regulations dealing with the time limitation were varied, the variations apparently being caused by the Department's understanding of certain court decisions. But that the construction above contended for is in accordance with the administrative interpretation of the word "liquor" is indicated by certain of the general regulations. Section 103 of Regulations 60, as revised March, 1924, and Section 10 (l) of Regulations 2, effective October 1, 1927, define Section 4 articles:

SEC. 103. The articles enumerated in section 4, Title II, national prohibition act, after having been manufactured and prepared for the market shall not be construed to be included within the word "liquor" or phrase "intoxicating liquor," as used herein, if such articles correspond with the description and limitations named in said section 4.

SEC. 10 (1). *"Liquor" or "intoxicating liquor"* shall be construed as defined in section 1, Title II, of the act; but the articles enumerated in section 4 of the act, after having been manufactured and prepared for the market shall not be deemed included within the word "liquor" or the phrase "intoxicating liquor" as used herein, if such articles correspond with the description and limitations stated in said section 4.

Cearly these definitions of "liquor" contemplate that Section 4 articles shal be treated as "liquor" until "prepared for the market."

Section 6 of Title II provides that "all permits to manufacture * * * liquor *may* be issued for one year, and *shall* expire on the 31st day of December next succeeding the issuance thereof." (Italics supplied.) Regulations 2 and 3 here involved therefore did no more than state the law of the National Prohibition Act, and hence respondents' permits were never valid, in any event, for a longer time than that for which they might have been issued under Section 6.

II

SECTION 6 OF TITLE II REQUIRES THAT ALL PERMITS HAVE A DEFINITE TIME LIMITATION. THE PERMITS HERE INVOLVED DO NOT CONTAIN A SUFFICIENT TIME LIMITATION UNDER THAT SECTION.

Even if it were held that the denatured alcohol and medicinal preparations here involved were not, at the time of manufacture, "liquor" within the meaning of the second paragraph of Section 6, it is submitted that the failure of the permits here in question to provide any definite time limitation rendered them invalid under a general provision of Section 6, which reads as follows:

> Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall *designate and limit the acts that are permitted and the time when and place where such acts may be performed.* (Italics ours.)

In the case of *Higgins* v. *Foster, supra,* the Circuit Court of Appeals for the Second Circuit held that Section 6 had no application to a permit to manufacture denatured alcohol. The third paragraph of Section 6 authorizes a court of equity to review the Commissioner's refusal to grant a permit. There is no other statute conferring such jurisdiction. In *Driscoll* v. *Campbell,* 33 F. (2d) 281, the same court held that Section 6 conferred jurisdiction upon the District Court to review the

Commissioner's refusal to grant a permit to use specially denatured alcohol. A permit to use specially denatured alcohol is required by regulation and not by statute. The permits involved in the instant cases and in the *Higgins* v. *Foster case* were required by Section 4. Clearly a Federal District Court may review the Commissioner's refusal to grant a Section 4 permit. It is submitted that the provision of Section 6 conferring this jurisdiction is no broader in its terms than the provision requiring that every permit shall designate and limit the time when the authorized acts may be performed. It follows that if, as held in *Driscoll* v. *Campbell*, the provision for review in Section 6 has the effect of conferring jurisdiction upon the District Court to review the Commissioner's action in refusing a permit to use specially denatured alcohol, which is not one specifically required by statute, then its requirement of what shall be designated and limited in every permit should likewise be held applicable to the permits here involved.

Section 6 directs that every permit shall *designate* and *limit* three things: (1) the acts that are permitted; (2) the time when, and (3) the place where, such acts may be performed. We submit it is plain that when Congress directed that every permit should designate the acts to be permitted and the place where they were to be performed it had in mind a definite and specific designation and not one which would leave open to speculation and

conjecture what acts or place were contemplated by the permit. In no other way could proper control be exercised over permittees. Likewise, and for a similar reason, Congress must have intended that the designation as to "time" should be definite. Not only must the time be *designated*, but the life of the permit must be *limited* to the designated time. The words "designate" and "limit" must be given the same meaning in respect to the "time" as they have with respect to the "acts" and "place." (See *Lewellyn* v. *Harbison* (C. C. A. 3d), 31 F. (2d) 740, 742.) Moreover, the limitation must be in the permit itself. Obviously, if an indefinite designation and indefinite limitation as to the "acts" and "place" will not satisfy the statute, then an indefinite designation and an indefinite limitation as to the "time" are insufficient.

Congress was fully aware of the difficulties always attendant upon efforts to suppress the liquor traffic. (*Donnelley* v. *United States*, 276 U. S. 505, 512–513.) A regulatory or permit system was not new. (*United States* v. *Katz*, 271 U. S. 354, 358–359.) It must have known that permits authorizing indefinite "acts" at an indefinite "place" issued for an indefinite "time" would render impossible of effective enforcement the permit system set up by the Act and defeat its purpose. We submit that when Congress used the words "designate" and "limit" it meant a definite designation and a definite limitation.

The permits here involved recited that they should remain in force until "revoked, suspended, or renewed as provided by law or regulations," or until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto."[1]

We submit that this is no sufficient limitation of time within the requirement of Section 6. Of course a permit would terminate upon "surrender," whether it contained a provision to that effect or not. There is no provision of law for the "suspension" of a permit, and hence the insertion of the word "suspended" was surplusage. In any event, a suspension of a permit would not terminate its life. A permit could not be "renewed" unless it had expired. The futility of limiting the life of a permit to the time of its beginning anew is obvious.

As to "revocation," Sections 5 and 9 of Title II direct that where a permittee is not manufacturing a Section 4 article according to authorized formula, or where he is not in good faith conforming to the National Prohibition Act or has violated a State law relating to intoxicating liquor, the Commissioner shall revoke his permit. These provisions are undoubtedly mandatory. See *Donnelley* v. *United States,* 276 U. S. 505. If a permit is revoked pursuant to the provisions of Section 5 or

[1] For a history of the regulations and decisions affecting the life of permits, see Appendix, pp. 31–33.

Section 9 it, of course, no longer continues in force. Obviously, a permit would terminate upon revocation even though it did not so provide. Congress in inserting a requirement that every permit shall designate and limit the time within which the acts authorized shall be performed must have had in mind the accomplishment of a purpose other than those to which Sections 5 and 9 relate. We submit that this purpose was the advantage to be afforded by a definite restriction upon the life of permits.

With permits terminating upon definite dates the permittee would be required periodically to apply for renewal of his permit and would have the burden of establishing his right to a new, or the renewal of an old permit. (Sec. 6; *Chicago Grain Products Co.* v. *Mellon, supra.*, p. 364; *Yudelson* v. *Andrews* (C. C. A. 3d), 25 F. (2d) 80, 82–83.) But such purpose is not accomplished by construing Section 6 as authorizing permits which, as held by the court below (R. 35), reserved to the administrative officers no right to terminate except by revocation proceedings particularly prescribed by the Act. Before the Commissioner may revoke an outstanding permit under Section 5 or Section 9 he must hold a hearing and establish one of the grounds of revocation therein specified. We submit that if Congress had intended that permittees should be subject to no more effective control than would be secured through the proceedings for revo-

cation authorized by those sections, it would not have required the limitation of time provided for in Section 6.

It is submitted that a permit having an indefinite time limitation was never authorized by the Act, and that Regulations 2 and 3 merely corrected an unwarranted practice. See *Higgins* v. *Mills*, 22 F. (2d) 913, 914.

III

SECTION 9 OF TITLE II IS NOT A LIMITATION UPON THE QUASI-LEGISLATIVE POWERS DELEGATED TO THE ADMINISTRATIVE OFFICERS

If, as held by the court below, Congress in enacting Section 6 did not intend to provide for the termination of Section 4 permits on a definite date, then we submit that the Act delegated to the Commissioner the power to fix the life of such permits by regulation; that Regulations 2 and 3 were promulgated in pursuance of such power, and that Section 9 of Title II, which relates to the revocation of permits, is not a limitation upon that power.

The National Prohibition Act delegates to the administrative officers certain quasi-legislative functions[1] and confers certain powers in their nature judicial.[2] The grant of power to issue regulations, having the force and effect of laws, is not

[1] Sections 1 (7), 4, and 6 of Title II; Sections 7, 8, 10, 11, and 13 of Title III.

[2] Sections 5, 6, and 9 of Title II.

uncommon (See *United States* v. *Grimaud*, 220 U. S. 506, 516–523; *Buttfield* v. *Stranahan*, 192 U. S. 470, 496; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 378–379; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 287; *Intermountain Rate Cases*, 234 U. S. 476, 486); and that Congress may confer upon administrative officers functions judicial in nature is well settled. See *Ex Parte Bakelite Corporation*, 279 U. S. 438, 452–453, 458. These powers may be united in a single hand. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 377–378, 385; *Keller* v. *Potomac Elec. Co.*, 261, U. S. 428, 442–443; *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452. When so united such powers are not to be confused. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210. That case involved a body created by State constitution and vested with both legislative and judicial powers. In speaking of the distinction to be drawn between the exercise of the two powers the Court said (page 226):

> But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by Section 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That

> is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Section 9 of Title II authorizes the revocation of an *individual* permit on present or past facts and under existing laws or regulations. It authorizes the exercise of a function judicial in nature. It guards against arbitrary or capricious action by requiring a hearing and the production of evidence. In *Chicago Grain Products Co.* v. *Mellon, supra,* it was said (p. 363):

> The provisions of section 9, title II, are limited to inquiries to determine whether *a permit shall be canceled for the reasons therein specified.* (Italics ours.)

It is, we submit, no limitation upon and in no way relates to the quasi-legislative power to establish *general* regulations.

Congress conferred the power to make regulations "for carrying out the provisions of this Act" (Section 1 (7), Title II), to "prescribe the form of all permits and applications and the facts to be set forth therein" (Section 6, Title II) and to issue regulations "from time to time" respecting denaturing plants and the distribution, sale and use of alcohol (Section 13, Title III).

A regulation promulgated under these sections "looks to the future and changes existing conditions

by making a new rule to be applied thereafter to all or some part of those subject to its power." *Prentis* v. *Atlantic Coast Line, supra,* p. 226. The function conferred is legislative in its nature. Since the administrative officers have been given the power to "prescribe the form of all permits," to prescribe regulations "for carrying out the provisions of this Act" and to issue regulations "from time to time" respecting the operation of denaturing plants, it follows that if Congress did not intend by Section 6 to provide for the termination of Section 4 permits on a definite date, it did confer upon the Commissioner the power to fix the life of such permits by regulations.

The power to promulgate regulations is not one to be once used and forever lost. *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 638; *Lacquer & Chemical Corporation* v. *Mills,* 22 F. (2d) 697, 699; affirmed 22 F. (2d) 700; certiorari denied, 276 U. S. 617; *Cywan* v. *Blair,* 16 F. (2d) 279, 282; *Millstone* v. *Yellowley,* 290 Fed. 855, 857. The administrative officers, acting in a field inherently subject to police regulations, could not bargain away the rights of the public (*Mugler* v. *Kansas,* 123 U. S. 623) and neither could they by a regulation providing for a permit of indefinite duration confer a vested right which would prevent them from promulgating a subsequent regulation terminating the permit on a day certain, with provision for its renewal, so that

they might have more effective supervision over permittees. As was said in *Cywan* v. *Blair, supra,* p. 282, with respect to T. D. No. 3773, containing provisions similar to Regulations 2 and 3 here involved:

> Perpetuities are not generally favored. The whole field of permit privileges, under not only the Prohibition Act, but all other acts, shows that the common practice is to limit permits for a definite period, renewable at the termination of each period. It is not clear and beyond doubt, as the complainant contends, that the Treasury Decision here involved is not a reasonable regulation.

It is submitted that the right to promulgate general regulations having the effect of general legislation is readily distinguishable from the right to cancel an individual permit or terminate a given right by a regulation or a legislative fiat. The power to curtail or destroy privileges accruing in a field subject to police regulation is inherent in Government. *Mugler* v. *Kansas, supra.* No power to deprive a particular person of a right by legislative fiat is asserted by the administrative officers here involved, and no attempt has been made to exercise such power. It follows, therefore, that Section 9 of Title II is not a limitation upon the quasi-legislative powers delegated to the administrative officers to establish general regulations.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decrees of the court below should be reversed.

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APRIL, 1930.

APPENDIX

STATUTE AND REGULATIONS

The National Prohibition Act, c. 85, 41 Stat. 305, 307–321:

TITLE II

SEC. 1. When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *

* * * * *

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations. * * * (U. S. C., Title 27, Sec. 4.)

SEC. 3. * * * and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. (U. S. C., Title 27, Sec. 12.)

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and pre-

pared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol * * * produced and used as provided by laws and regulations now or hereafter in force.

* * * * *

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

(d) * * * medicinal * * * preparations * * * that are unfit for use for beverage purposes.

* * * * *

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, * * *. (U. S. C., Title 27, Sec. 13.)

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except * * *.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided,* That the commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further,* That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed

ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor.

No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the

commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 5 hereof. (U. S. C., Title 27, Sec. 16.)

* * * * *

SEC. 5. Whenever the commissioner has reason to believe that any article mentioned in section 4 does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor * * *.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in Section 4 of this Title, his permit to manufacture and sell such article shall be revoked. * * * (U. S. C., Title 27, Sec. 14.)

SEC. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing

such person to appear before him on a day named * * * at which time a hearing shall be had unless continued for cause. * * * If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. * * * (U. S. C., Title 27, Sec. 21.)

TITLE III

SEC 10. Upon the filing of application and bond and issuance of permit denaturing plants may be established upon the premises of any industrial alcohol plant, or elsewhere, and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is authorized to be used, unfit for use as an intoxicating beverage.

Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export. * * * (U. S. C., Title 27, Sec. 80.)

SEC. 11. Alcohol produced at any industrial alcohol plant or stored in any bonded warehouse may, under regulations, be withdrawn tax free as provided by existing law from such plant or warehouse for transfer to any denaturing plant for denaturation, or may, under regulations, before or after denaturation, be removed from any such plant or warehouse for any lawful tax-free purpose.

* * * * *

But any person permitted to obtain alcohol tax free * * * shall first apply for and secure a

permit to purchase the same and give the bonds prescribed under title II of this Act * * *. (U. S. C., Title 27, Sec. 81.)

SEC. 13. The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of * * * denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products. (U. S. C., Title 27, Sec. 83.)

Regulations 2, Treasury Department, Bureau of Prohibition, effective October 1, 1927:

Sec. 10. (*l*) *"Liquor" or "intoxicating liquor"* shall be construed as defined in section 1, Title II, of the act; but the articles enumerated in section 4 of the act, after having been manufactured and prepared for the market shall not be deemed included within the word "liquor" or the phrase "intoxicating liquor" as used herein, if such articles correspond with the description and limitations stated in said section 4.

Sec. 218. *All permits to be renewed annually.*— All permits issued and in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed in the manner

hereinafter specified; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year, and if issued after August 31 of any calendar year shall expire on December 31 of the succeeding calendar year, and may be renewed only in the manner hereinafter specified.

Regulations 3, Treasury Department, Bureau of Prohibition, revised, effective October 1, 1927:

ART. 95. * * * Permits issued to operate denaturing plants in force and effect on the effective date of these regulations shall expire on December 31, 1928, unless renewed; all permits hereafter issued, if issued prior to September 1 of any calendar year, shall expire on December 31 of the same year; and if issued after August 31 of any calendar year, shall expire on December 31 of the succeeding calendar year, unless duly renewed.

HISTORY OF REGULATIONS AND TREASURY DECISIONS

On January 16, 1920, Regulations 60 were promulgated. Regulations 60 governed the manufacture of all the articles enumerated in Section 4 of Title II, except denatured alcohol. Section 18 of these Regulations provided that all manufacturing permits issued thereunder prior to August 31 of any year would expire on December 31 of such year, and that all such permits issued from September 1 to December 31 of any year would expire on December 31 of the following year, unless otherwise provided. On January 31, 1920, Regulations 61 were promulgated. These regulations governed the manufacture of denatured alcohol. Article 97 thereof

provided that permits to manufacture denatured alcohol would remain in force until voluntarily surrendered or revoked by the Commissioner.

On March 14, 1924, Regulations 60 were revised so as to provide that manufacturing permits issued under Section 4 of Title II should continue in force until canceled, suspended, revoked or voluntarily surrendered by the permittee. (Section 260, pp. 17–18, Regulations 60, as revised.) On November 14, 1925, Treasury Decision 3773 was promulgated. This Decision provided that all manufacturing permits, including permits to manufacture denatured alcohol, issued prior to August 31 of any calendar year, should expire on December 31 of the same year, and that all manufacturing permits issued after August 31 of any calendar year should expire on December 31 of the succeeding year.

On June 1, 1926, the Circuit Court of Appeals for the Second Circuit, in the case of *Higgins* v. *Foster*, 12 F. (2d) 646, held that Treasury Decision 3773 was void in so far as it attempted to cancel a permit of indefinite duration, issued under Regulations 61, authorizing the manufacture of denatured alcohol.

On September 1, 1926, Treasury Decision 3925, so far as here pertinent, rescinded Treasury Decision 3773.

On November 9, 1926, the Circuit Court of Appeals for the Seventh Circuit, in the case of *Chicago Grain Products Co.* v. *Mellon*, 14 F. (2d) 362, held that Treasury Decision 3773 was valid. On September 2, 1927, Regulations 2, being a revision of Regulations 60, were promulgated. On August 23, 1927, Regulations 3, being a revision of Regu-

lations 61, were promulgated. Both were effective October 1, 1927. Regulations 2 and 3 substantially reenacted the provisions of Treasury Decision 3773 and purported to terminate all outstanding unlimited manufacturing permits as of the 31st day of December, 1928. (Section 218 of Regulations 2; Article 95 of Regulations 3.)

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